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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
and THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may penalize a company for failing to bargain with a labor union when (a) the union had refused to deal with the company and (b) the Board had designated a different company as the statutory employer with the duty to bargain.

2. Whether the legal standard for determining the existence of an employment relationship under the National Labor Relations Act is different from the one applied by this Court under the Federal Employers' Liability Act in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974).

3. Whether, when the National Labor Relations Board applies an incorrect legal standard in finding an employment relationship, a reviewing court nevertheless may approve the Board's finding on the ground that substantial evidence would have supported such a finding under the presumptively correct standard.*

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* The caption of the case in this Court contains the names of all parties to the proceeding in the court of appeals except Local 103 of the International Typographical Union, AFL-CIO.

Petitioners News Printing Company, Inc., and The Hudson Dispatch, which have no subsidiaries, are wholly owned by petitioner Allbritton Communications Company, which in turn is wholly owned by Perpetual Corporation. The petitioners have no non-wholly owned subsidiaries and no affiliates other than Perpetual Corporation and its wholly owned subsidiaries and sub-subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 766 F.2d 812 (3d Cir. 1985).[1] The decision and order of the National Labor Relations Board (App. B), which incorporate the decision of its administrative law judge, are reported at 271 N.L.R.B. No. 39 (1984).

JURISDICTION

The judgment of the court of appeals (App. C) was entered on August 6, 1985. A timely petition for rehearing was denied on September 3, 1985 (App. D). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1982).

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[1] "App." refers to the separately bound Appendix which accompanies this petition.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982), provides in pertinent part:

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .

Section 9(c)(1) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 159(c)(1) (1982), and the Board's regulations governing certification of collective bargaining representatives, 29 C.F.R. §§ 102.60-.72 (1985), are set forth in pertinent part at App. E.

STATEMENT

This case arises out of the relationship between The News Printing Company, Inc. ("The News"), T & T News Company, Inc. ("T & T"), and the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"). The News publishes a newspaper in Paterson, New Jersey.[2] T & T delivered copies of the newspaper to retailers and distributors pursuant to a contract with The News. The NMDU represents T & T's employees.

The News and T & T are unrelated corporations having no common ownership or control. Under their contract, T & T picked up each day's press run at The News' mailroom and delivery dock and delivered the

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[2] The News is owned by Allbritton Communications Company, which also owns The Hudson Dispatch. For purposes of this case, these three corporations may be treated as a single unit.

newspapers in trucks leased by The News and bearing The News' logo. The contract provided for a fixed weekly payment to T & T, with an adjustment clause for labor costs. T & T hired, fired, and paid its own employees.

The NMDU has represented T & T's drivers since 1964, when the National Labor Relations Board ("the Board") certified T & T's predecessor, Silk City Distributing Co., as their employer and the NMDU as their collective bargaining representative. Over the years, T & T and the NMDU negotiated a series of collective bargaining agreements covering wages, hours, seniority practices, and other terms and conditions of employment. These agreements were separate from the contracts between T & T and The News and ran for different terms.

During the 1970s, The News suffered a string of substantial operating losses. The News attempted in various ways to restructure operations and restore profitability. For example, The News discontinued its afternoon edition in 1980 and obtained T & T's agreement to seek "the maximum possible reduction of manpower with respect to [T & T's employees] under the NMDU contract then in force." App. B at 90a. The News also tried to meet with the NMDU to enlist the union's assistance in resolving the paper's financial problems. But the NMDU categorically refused to meet with The News, stating:

> We understand that [The News] has a commercial agreement for the delivery of its newspapers with a Wholesaler [T & T] with whom the Union has a contract. Under those circumstances, the Union cannot go behind the Employer with whom it has contracted and negotiate a separate agreement.
>
> Regardless of the financial condition of [The News] we recommend that you conduct discussions with the Wholesaler. It is only if those discussions directly affect contractual obligations of the Whole-

> saler that the Union would become involved and in that event its discussions would be limited to the Wholesaler.

J.A. 1615.[3]

The incident that gave rise to this case occurred a few months thereafter. It concerned the handling of separately printed advertising supplements. T & T's practice had been to place supplements on top of a bundle of newspapers and to deliver them in that manner, charging a separate fee for doing so. Advertisers complained, however, that supplements were lost or never inserted in individual copies of the newspaper and thus were not received by readers. To cure this problem, on February 9, 1981, The News hired its own employees to insert the supplements into individual copies of the newspaper on its premises before delivery by T & T. T & T's employees vehemently objected to this and interrupted the press run. The News ordered T & T from its premises and undertook to make deliveries itself. The NMDU immediately picketed The News and, three days later, its members went on strike. The News continued operations, with newspapers being delivered by its own employees.

On January 18, 1982, the Board's Regional Director filed a complaint against The News, alleging that it had violated section 8 of the National Labor Relations Act, *as amended*, 29 U.S.C. § 158 (1982), by failing to bargain with the NMDU before hiring employees to insert advertising supplements and by ordering T & T from the premises. The complaint rested on the theory that The News employed T & T's employees because T & T was its "agent." J.A. 15. After a hearing, an administrative law judge ("ALJ") ruled that the Board's General Counsel was collaterally estopped from litigating the question

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[3] "J.A." refers to the joint appendix in the court of appeals. For the Court's convenience, the NMDU's letter is reproduced as App. F.

whether The News was the statutory employer of T & T's employees, because that question had been decided in The News' favor in separate litigation with the NMDU. The ALJ noted, however, that in the absence of collateral estoppel he would have found The News and T & T to be "joint employers." App. B at 106a.

The Board did not accept either the ALJ's conclusion concerning collateral estoppel or his suggestion that The News and T & T were joint employers. Instead, the Board determined that The News was the statutory employer of T & T's drivers because T & T was "the agent of [The News]." App. B at 29a. The Board reasoned that "[t]he relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status." *Id.* at 30a.

Before the Board, The News had argued both that it did not employ T & T's drivers and that, in any event, it could not be held liable for refusing to bargain with the NMDU when the Board had certified T & T's predecessor as the employer and the NMDU had refused to meet with The News. Without addressing the latter issue, the Board simply ordered The News to bargain with the NMDU, to "reinstate" T & T's drivers, and to pay them backpay from 1981.

On petition for review before the United States Court of Appeals for the Third Circuit,[4] The News argued that the Board had confused the concept of "agency" with that of "employment" and, as a consequence, had wrongly held The News to be the statutory employer of T & T's employees solely because T & T was its agent. The News pointed out that, under *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), it could be treated as the employer of T & T's employees only if there was a master-servant relationship between the two companies

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[4] The jurisdiction of the court of appeals rested upon section 10 of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160 (1982).

and "a finding of agency is not tantamount to a finding of a master-servant relationship." *Id.* at 325. The News also urged the court of appeals to follow *Alaska Roughnecks and Drillers Association v. Mobil Oil Corp.*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978). In that case the Ninth Circuit, relying upon *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), held that a company may not be penalized for an alleged refusal to bargain "when it was neither afforded an opportunity to participate in the certification proceedings nor [previously] requested by the union to bargain." 555 F.2d at 735.

The Third Circuit acknowledged, as the Board had not, that under *Kelley* The News could be held liable for a failure to bargain as the statutory employer only upon the finding of a master-servant relationship between The News and T & T. But the court held that such a finding could be based upon a generalized test of agency, *i.e.*, whether The News had "exercised significant control over the conduct of T & T and its employees." App. A at 12a. Although the Board had not applied even that test, at least not explicitly, the court equated the Board's findings with a determination that T & T's drivers "were subservants [*sic*] of T & T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers." *Id.* The court stated that such a determination was supported by substantial evidence, citing contested evidence on which the Board had made no findings of fact.

The court of appeals rejected the argument under *Alaska Roughnecks* as "unpersuasive." *Id.* at 15a. Despite the Board's failure to afford The News an opportunity to participate in a prior representation proceeding, and despite the NMDU's previous denial of a bargaining relationship with The News, the court reasoned that "The News asserted effective control over T & T and [its drivers and thus] . . . cannot now be heard to complain [of] the concomitant . . . duty to negotiate and

abide by the terms of the existing collective bargaining agreement . . . ." *Id.* at 15a-16a.

REASONS FOR GRANTING THE PETITION

The judgment below, holding that a company may be penalized for failing to bargain with a labor union even though the union had refused to deal with it and the Board had designated another company as the statutory employer, conflicts with both *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), and *Alaska Roughnecks and Drillers Association v. Mobil Oil Corp.*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1609 (1978). This Court should grant review to resolve this conflict on a fundamental question relating to the duty to bargain under the National Labor Relations Act ("NLRA").

In addition, the court of appeals applied the wrong legal standard in determining that The News is the statutory employer of T & T's employees. Although the court's opinion pays lip service to the requirement of a master-servant relationship between the two companies, as required in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), the court in fact applied the test that was proposed by the dissenters and rejected by the majority in *Kelley*. This Court should grant certiorari to clarify that the common law test of employment applied under the Federal Employers' Liability Act ("FELA") by the majority in *Kelley* also applies under the NLRA.

Moreover, in affirming the Board's decision that The News was the statutory employer of T & T's employees—a decision reached by the Board without first finding a master-servant relationship between The News and T & T under any legal standard—the court of appeals violated the well-established principle that "an order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This Court should take the case to reaffirm the continuing vitality of that basic rule of administrative law.

1. *The decision below conflicts with decisions of this Court and other courts of appeals on a fundamental question relating to the duty to bargain.* The statutory duty to bargain under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), presupposes the existence of an established bilateral relationship. In addition to an employer, there must be an employees' representative who is willing and able to bargain in return. If the employees have no representative, or if the representative refuses or is unwilling to bargain or otherwise waives the right to bargain, the employer has no duty to bargain collectively and indeed cannot do so.[5]

These considerations form the very bedrock of the duty to bargain. As this Court explained in the seminal decision of *Columbian Enameling*:

> Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain.

306 U.S. at 297. It follows that "a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2d Cir. 1983). *Accord Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 472 (3d Cir. 1983); *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 384 (2d Cir. 1967).

The certification process reflects the central importance of prior notice to the employer of the existence of

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[5] The duty to bargain arises only when the employees have designated a bargaining representative and demanded bargaining. By statute, the representative is "exclusive." 29 U.S.C. § 159(a). The employer may not bargain with anyone other than the representative, including the employees themselves. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

a representative who is willing and able to bargain. An employer is entitled, by statute and regulation, to notice and an opportunity to participate in a proceeding to certify a union as the collective bargaining representative of its employees. 29 U.S.C. § 159(c)(1); 29 C.F.R. §§ 102.61, .63 (1985). The employer also is entitled to notice and hearing whenever a union seeks to amend an existing certification. *Id.* Thus, the Board's own regulations contemplate that an employer will have notice and an opportunity to be heard *before* it becomes charged with the duty to bargain.

Indeed, because the duty to bargain arises in the context of an established bilateral relationship, notice of the existence of such a relationship becomes a matter of constitutional significance. As a matter of due process, a company has no duty "to bargain with the union when it was neither afforded an opportunity to participate in the certification proceedings nor requested by the union to bargain." *Alaska Roughnecks*, 555 F.2d at 735. *Cf. International House v. NLRB*, 616 F.2d 906, 911 (2d Cir. 1982); *NLRB v. Jordan Bus Co.*, 380 F.2d 219, 223 (10th Cir. 1967).

The decision below ignores these principles and directly conflicts with both *Columbian Enameling* and *Alaska Roughnecks*. The Board has never designated The News as the employer of T & T's employees in a certification proceeding. In the only certification proceeding involving those employees, the Board designated T & T's predecessor, Silk City Distributing Co., as the employer. The News had no notice or opportunity (or reason) to participate in that proceeding.

The court below nevertheless sought to justify its decision on the ground that "in 1977, The News asserted effective control over T & T . . . ." App. A at 15a. Neither the Board's decision nor the record supports the court's assertion that, in either 1977 or at any other time, a significant change occurred in the relation-

ship between The News and T & T that warranted an amendment to the NMDU's certification. But if such a change had occurred, the NMDU's recourse was to initiate a proceeding to have The News designated as the employer. The NMDU did not do so. The NMDU never took any action to give The News formal or even casual notice that it would be looked to as an employer with the duty to bargain.

In fact, the NMDU did precisely the opposite. It denied that it had any bargaining relationship with The News. When The News sought to meet with the NMDU to discuss ways in which operations could be revised to reduce costs, it was rebuffed. Through its attorney, the NMDU firmly stated that T & T, not The News, was the statutory employer; the NMDU refused to conduct any discussions whatsoever with The News. App. F. It was only after The News had taken the actions giving rise to this case—hiring employees to insert advertising supplements on its own premises and ordering T & T off the premises when T & T's employees physically interfered with The News' press run—that the NMDU claimed that The News had a prior obligation to bargain. This was a startling reversal of direction: for the previous seventeen years, the NMDU had asserted that T & T, not The News, was its members' employer.

The Board and the Third Circuit should not have rewarded the NMDU for playing this cat-and-mouse game. It was plain error to penalize The News for failing to bargain. Because "there can be no breach of the statutory duty by the employer . . . without some indication given to him by [his employees] or their representatives of their desire or willingness to bargain," *Columbian Enameling*, 306 U.S. at 297, and because a company has no duty to bargain "when it was neither afforded an opportunity to participate in the certification proceedings nor requested by the union to bargain," *Alaska Rough-*

necks, 555 F.2d at 735, neither this Court nor the Ninth Circuit would have upheld the Board's order in this case.

The duty to bargain may be the central obligation imposed by the NLRA. It is important that the rules relating to this duty be clear, understandable, and consistently administered. Simple equity demands no less. Here, the Board had designated T & T's predecessor as the employer, and the NMDU had denied the existence of any bargaining relationship between itself and The News. In these circumstances, it would be unreasonable to expect The News to recognize, let alone fulfill, a statutory duty to bargain over the handling of advertising supplements. It is markedly unfair to saddle The News with four years of backpay liability for doing nothing more than the NMDU had insisted it must do, *i.e.*, act on its own without the benefit of prior discussions with the union.

A major federal regulatory program should not hinge upon a duty that cannot be reasonably ascertained in advance. Whenever the NLRA is enforced in a manner that requires one company to bargain with another company's employees, confusion and uncerainty will reign unless clear rules permit determination of the existence of the duty in advance. In the absence of a certification proceeding, a company often cannot determine whether the Board will later deem it to be the employer of another company's employees. Likewise, the representative of those employees cannot know what legal rights and duties they have vis-a-vis that company. There is no more compelling evidence of this than the NMDU's own prior insistence that The News did not employ its members. Such uncertainty leads to misunderstandings, litigation, and, in cases like this, the unfair assessment of retroactive liability.

Efficient administration of the Act and the establishment of predictable, stable, and harmonious collective bargaining relationships require adherence to the clear

rule set forth by this Court in *Columbian Enameling* and followed by the lower courts in such cases as *Alaska Roughnecks* and *Island Typographers*. This court should grant review in order to reaffirm that rule and to reverse the Third Circuit's erroneous departure from it.

2. *The decision below and this Court's decision in* Kelley *establish conflicting standards of employment.* In *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), this Court held that the proper legal standard for determining the existence of an employment relationship under the FELA was the common law test for "the master-servant relationship." *Id.* at 325. The Court expressly rejected the dissenters' suggestion that a generalized test, combining elements of the principal-agent and master-servant relationships, should be used. Instead, the Court endorsed the definition of "servant" set forth in the Restatement (Second) of Agency, *i.e.*, "a person employed to perform services in the affairs of another and who with respect to the *physical conduct* in the performance of the services is subject to the other's control or right to control." *Id.* at 324 (emphasis supplied). The Court stressed, furthermore, that "a finding of agency is not tantamount to a finding of a master-servant relationship." *Id.* at 325.

The Board in this case ignored *Kelley* and departed from its teaching. The Board did not distinguish between the relationship of principal-agent and that of master-servant. Instead, it confused and assimilated those two very different concepts, as when it stated that "[t]he relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status." App. B at 30a. The Board's complaint had rested on the theory that T & T was The News' agent, and the Board's holding rested on its finding that "T & T was . . . the agent of [The News]." *Id.* Under *Kelley*, that plainly was an inadequate basis for treating The News as the statutory employer.

The court of appeals affirmed on the ground that, in its view, substantial evidence would support a finding that "T & T . . . was a servant of [The News]." App. A at 12a. By thus speaking in terms of a master-servant relationship, the court gave the appearance of following *Kelley*. In reality, the court was following the *Kelley* dissent. In finding T & T to be The News' servant, the Third Circuit, like the Board, was applying a generalized and vague "right to control" test that did not distinguish between the relationship of an agent to his principal and that of a servant to his master. The court satisfied itself with the observation that the Board had found "significant control," *id.*, a finding that does not distinguish between agency and employment.

In short, although the court paid lip service to *Kelley*, its approach is diametrically opposite to that taken by the majority in that case. This is vividly demonstrated by the outcomes of the two cases. In *Kelley*, this Court was unwilling to find that a corporation was the employer of its own subsidiary's employees. In contrast, the Third Circuit has held The News to be the employer of T & T's employees even in the absence of any common ownership or common corporate control.

No purpose is served by applying a different standard of employment under the NLRA than this Court applied under the FELA in *Kelley*. Those two federal statutes should be construed in harmony, with like terms being given like construction. *Cf. Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496, 504-08 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978). Moreover, this Court already has affirmed that common law principles govern questions of employment under the NLRA. *See NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). The court below should have adopted and applied not just the master-servant terminology used in *Kelley* but also the underlying common law test that was given effect in that case. This

Court should grant review to clarify that the test is the same under both the FELA and the NLRA and that the test actually applied by the majority in *Kelley* governs here as well.

3. *The decision below violates a basic rule of administrative law.* Whether or not the Third Circuit applied the proper test of employment, it is clear that the Board did not do so. The Board regarded agency and employment as synonymous, and it held The News to be the employer of T & T's employees on the ground that T & T was The News' agent. The Third Circuit apparently recognized that the Board had erred at least in its articulation of the proper legal standard, for unlike the Board the court cited *Kelley* and used the master-servant terminology of that case. But instead of remanding for application of the proper legal standard, the court took upon itself the responsibility for determining the existence of a master-servant relationship. In doing so, the court of appeals stepped well outside the limits that this Court traditionally has placed upon the exercise of judicial power in reviewing administrative action. "[I]t was error to enforce without a remand to the Board for further examination of the evidence and proper fact-finding." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 672 n.6 (1981).

For nearly a century now, this Court has "emphasized a simple but fundamental rule of administrative law." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id. Where, as here, "an administrative agency has made an error of law, the duty of the [reviewing] Court is to

'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB v. Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)).

The lower court's departure from this settled rule was not mere harmless error. In determining that T & T was The News' agent, the Board did not find facts sufficient to establish that T & T also was The News' servant. "A servant is an agent . . . whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2(2). The Board's findings did not address the question of The News' right to control T & T's physical conduct in carrying out its contractual obligations.[6] Thus, it cannot be known whether the Board,

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[6] The Board expressed the sum of its findings on this point in a single sentence:

> T & T [1] performed functions which were an essential part of the newspaper's operation, [2] had a long-term exclusive working arrangement with the newspaper, [3] carried the newspaper's product in trucks bearing the newspaper's name, [4] conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, [5] had no proprietary interest in the work or the premises and equipment used to perform it, and [6] had no opportunity to take entrepreneurial risks.

App. B at 30a. Point [1] was held inadequate to establish an employment relationship in *Kelley*. *See* 419 U.S. at 325-26. Points [2] and [3] are irrelevant. *See, e.g., NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 923 (11th Cir. 1983); *Hilton International v. NLRB*, 690 F.2d 318, 322 (2d Cir. 1982). Points [5] and [6] do little more than describe the cost-plus nature of the delivery contract between The News and T & T. Only point [4] goes to the question of control, and it appears to speak only to the kind of control normally exercised by a principal over its agent.

if it had applied the correct test, would have found that a master-servant relationship existed between The News and T & T.

In making that finding for the Board, the court of appeals committed a number of prejudicial mistakes. The court asserted, for example, that "[t]he costs of establishing T & T were paid for by The News," App. A at 13a, whereas the record demonstrates that T & T's owners established the business by making "the normal business investment" and that they additionally gave The News a bond to guarantee contractual performance. J.A. 422. The record also contradicts the court's suggestion that The News paid for T & T's operating expenses and "retained the right to demand that T & T discharge any driver, supervisor or assistant foreman who did not meet [The News'] approval." App. A at 13a.[7]

These factual errors stem from the court's failure to respect the proper division of labor between itself and the Board. A reviewing court has neither the expertise nor the procedures for making *de novo* findings of fact. Because it usurped the Board's function, the court of appeals committed factual mistakes going to the very heart of its decision on the merits. Thus, this case vividly illustrates the wisdom of this Court's "fundamental rule of administrative law" and the vital importance of requiring the lower courts to continue to adhere to it.

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[7] T & T paid for its own accountants, bought its own stationery, and furnished, "at its own sole cost and expense, bill heads, ledgers and cashbooks and any other items to properly keep a bookkeeping system and all supplies needed in preparation of the daily wrappers." J. A. 422, 506, 1133. The News had the right to require T & T to remove drivers only if they were unsafe —a contractual provision that simply mirrored the right of the trucks' lessor to require The News to effectuate such removal. J. A. 1129-30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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